No. SC83485

IN THE
SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,

Respondent,

vs.

ANDRE V. COLE,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
Honorable David Lee Vincent III, Judge

BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

Decisions

Constitutional Provisions, Statutes and Rules

JURISDICTIONAL STATEMENT

This appeal is from convictions of murder in the first degree, §565.020, RSMo 2000; the class A felony of assault in the first degree, §565.050, RSMo 2000; burglary in the first degree, §569.160, RSMo 2000; and two counts of armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of St. Louis County and for which appellant was sentenced to death, three life sentences and thirty years imprisonment, all sentences to run consecutively. Because of the sentence of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Andre V. Cole, was charged by indictment on October 15, 1998 with murder in the first degree, the class B felony of assault in the first degree, burglary in the first degree and two counts of armed criminal action (L.F. 1, 21-23).[1] A superceding indictment filed on November 30, 2000 increased the assault charge to a class A felony, and appellant was charged as a prior and persistent offender in an information in lieu of indictment filed on December 20, 2000 (L.F. 91-95, 105-107). Appellant's jury trial commenced on January 9, 2001 in the Circuit Court of St. Louis County, the Honorable David Lee Vincent III presiding (Tr. 27).

Appellant contests the sufficiency of the evidence to sustain his conviction of first degree murder. Viewed in the light most favorable to the verdict, the evidence at trial showed the following: in March of 1995, appellant and his wife, Terri Cole, divorced after eleven years of marriage (Tr. 846, 953). The divorce decree awarded Terri Cole their home, located at 10151 Castle Drive in north St. Louis County, and primary custody of their two children, Anthony and Marcus (Tr. 846-847, 910-911, 915). Appellant was ordered to pay Cole $320.00 per month in support for the care of the children (Tr. 847, 949).

Beginning in mid-1996, appellant periodically failed to pay the child support that was due to Terri Cole (Tr. 1022-1023); a number of orders were issued to appellant's employers,

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[1]The record on this appeal consists of the three-volume trial transcript ("Tr."), the two-volume trial legal file ("L.F."), a supplemental legal file ("Supp.L.F.") and various state's exhibits ("S.Ex.") as designated.

directing that part of his salary be withheld to pay child support (Tr. 857-859, 1322, 1364). On one occasion, appellant quit his job shortly after receiving notice of such a withholding order (Tr. 1322-1323). By July of 1998, appellant's child support arrearage had increased to nearly three thousand dollars (Tr. 1022-1023).

On July 31, 1998, a letter was sent to appellant by the Department of Social Services advising him that a withholding order had been issued to his current employer, the St. Louis Zoo (Tr. 848-850, 1025-1028). Appellant filled out and returned a form in which he requested a hearing to challenge the withholding order (Tr. 1028-1029, 1034-1035, 1335-1336). In conversations with fellow workers at the Zoo, appellant expressed his anger at the amount of child support that he was required to pay to Terri Cole and said that "Before I give her another dime I'll kill the bitch" (Tr. 872-874, 880-881, 886-887).

At around 5:00 pm on Friday, August 21, appellant received his paycheck in the mail and discovered that a deduction had been made for the payment of child support (Tr. 866-868, 1337-1338). At 7:30 that evening, a woman living in a house catercorner to Terri Cole's home saw a black man in a large American-made car parked outside her house, watching Cole's residence (Tr. 826-828, 831-833; S.Ex. 105). Appellant is an African-American and drove a Lincoln Town Car (Tr. 880, 1010, 1083, 1257). After watching Cole's house for several minutes, the man drove away (Tr. 832-834); although it was getting dark, he did not turn on his headlights (Tr. 831, 833).

Terri Cole was at home that evening. Shortly after 8:00, she was visited by Anthony Curtis, whom she had met after her divorce (Tr. 911, 954). After Cole's sons had left for a

skating party, Cole and Curtis drove to get take-out food and rent some movies, and returned to her house at around 9:15 (Tr. 911-912, 954-955). There, they sat in the living room and watched a movie while Curtis ate dinner (Tr. 913, 955). The living room in Cole's residence was at the front of the house, with entry through the front door (Tr. 747-750; S.Ex. 10, 27-32, 88). Behind the living room, accessible through a passageway, was the dining room, which in turn opened onto a wooden deck in the backyard of the house by means of a sliding glass door (Tr. 750-752; S.Ex. 10, 30, 33-35, 88). The glass door was locked and barred (Tr. 914).

Roughly twenty minutes after Terri Cole and Anthony Curtis had returned to Cole's home, appellant parked his car on the street behind the house (Tr. 1293-1294; S.Ex. 9, 16-18). After making a call on his portable phone, appellant got out of his car, climbed over a chain-link fence and walked to the back deck of the residence (Tr. 1085-1086, 1295, 1298-1301; S.Ex. 9). He took with him a kitchen knife with a seven-inch blade, a loaded pistol and an automobile jack (Tr. 940-941, 951, 964, 1001, 1013-1014, 1118, 1295-1296, 1398-1403). Once on the deck, he threw the jack through the glass door leading into the dining room (Tr. 1267, 1301-1302; S.Ex. 25, 34). This triggered the house's burglar alarm, which sent a signal to the burglar alarm company at 9:42 (Tr. 1086-1087, 1268).

In the living room, Terri Cole heard a crash and a sound of falling glass, and saw appellant coming through the passageway from the dining room (Tr. 916-918, 957-960, 970, 972-977, 1006-1007; S.Ex. 10). Over the loud noise of the burglar alarm, appellant shouted and cursed at Cole, asking "why was [she] doing this to him" and saying that he still loved her (Tr. 917-918, 961). Anthony Curtis said to appellant, "Hey, man, you're not supposed to be

here. Why don't you leave?" and backed away from appellant toward the front door and opened it (Tr. 918-919, 937, 971, 976-980; S.Ex. 27). Appellant attacked Curtis with his kitchen knife, and the two men struggled around the living room, falling to the floor together on one occasion, and stumbling together another time (Tr. 919-920, 980-987, 990-993, 1008-1009; S.Ex. 10). During this struggle, Curtis sustained thirteen "defense wounds" to his hands (Tr. 687-691, 700-701; S.Ex. 80-80C, 81-81B); Terri Cole heard him saying words like "stop" and "ouch" and "cut it out" (Tr. 920, 981). Appellant, who was left-handed, also stabbed Curtis in the right chest, penetrating his right lung (Tr. 691-692, 697-698, 937; S.Ex. 79, 82).

Curtis, who weighed more than three hundred pounds, finally fell face-down onto the floor next to a couch (Tr. 686-687, 920-923, 985, 992-993, 1009-1010; S.Ex. 10, 29). Appellant stooped over Curtis and stabbed him a number of additional times in the back (Tr. 922). Terri Cole tried to pull appellant away from Curtis, but without success (Tr. 993, 1012). Curtis suffered seven stab or slash wounds to his back, six on the right side and one on the left side, as well as a wound to the back of his head (Tr. 692-693; S.Ex. 79, 83-87). Several of the wounds on the victim's right side were grouped in such a manner as to suggest that he was not moving when stabbed (Tr. 703).

After overcoming Anthony Curtis, appellant turned his knife on Terri Cole (Tr. 923). He stabbed her repeatedly in the stomach, breasts, back and arms, and she suffered defense wounds to her hands while trying to grab the knife blade (Tr. 923-925, 1012). Cole fell and hit her head on a table and, as she was lying on the floor, appellant stabbed her more times in the chest (Tr. 925-926, 942). One or more of these stab wounds pierced her lungs and she

began gasping for breath (Tr. 924). Appellant then left the house by means of the shattered back door (Tr. 927).

Cole called 911, and police responded to her call and to the previous burglar alarm (Tr. 611-612, 626, 927-929). When paramedics arrived a short time later, they determined that Anthony Curtis was not breathing and had no pulse (Tr. 663-669). He was taken to the hospital, but could not be revived (Tr. 672-673, 685-686). A number of the stab wounds inflicted by appellant were potentially fatal, having pierced Curtis's lungs and other vital organs, but the immediate cause of the victim's death was a stab wound to the left side of his back that penetrated eight inches into his body and cut his aorta (Tr. 698-702; S.Ex. 79, 84). Terri Cole underwent emergency surgery for her injuries and remained in the hospital for five days after the assault (Tr. 931-935).

Police discovered the knife used by appellant in the attacks on Cole and Curtis on the deck behind Cole's house (Tr. 616, 622, 759-760, 952; S.Ex. 9, 37, 88). DNA analysis matched bloodstains on the knife with the blood of both victims (Tr. 1121-1122). Other bloodstains on the deck, on the backyard fence, and in the street where appellant's car had been parked were identified as having come from appellant (Tr. 755-761, 1123-1127, 1293-1294; S.Ex. 9, 39-44, 54-56, 88). In the dining room of the house, just inside the shattered glass door, were a loaded pistol and an automobile jack (Tr. 620, 774, 783-784; S.Ex. 10, 34, 45, 57-58, 88). Neither had been in the house before appellant's forcible entry (Tr. 940-941, 951, 1001-1002). Entangled in the jack was a gold chain with a broken clasp (Tr. 789, 809-811, 1053-1055, 1098-1099). This chain was similar to ones regularly worn by appellant (Tr.

1015, 1017, 1352, 1399, 1406).

Appellant, who had been wounded in the leg during his assaults on Anthony Curtis and Terri Cole, disposed of the clothes he had been wearing and fled the state (Tr. 1280-1286, 1320-1321). He returned to St. Louis and surrendered to police on September 23, 1998, thirty-three days after these offenses (Tr. 1081-1082).

Appellant took the stand and called five other witnesses in his defense (Tr. 1192-1398). His account was that after he broke the glass in the back door, Anthony Curtis came outside and attacked him with a knife; that while they were struggling, he saw Terri Cole's arm go down behind Curtis and observed Curtis grimace as if in pain; that he saw a knife in Cole's hand a short time later; that Curtis and Cole then went back into the house; and that Cole later came outside and told appellant that she had been stabbed (Tr. 1269-1279, 1303-1316). Appellant denied having a knife or any other weapon during this altercation (Tr. 1269-1270, 1313, 1344, 1367-1369). He admitted to two prior convictions for the felony of carrying a concealed weapon, one for the felony of violation of an adult abuse order, and one for the misdemeanor of failure to return to confinement (Tr. 1290, 1346-1348). At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty as charged of first degree murder, first degree assault, first degree burglary and two counts of armed criminal action (Tr. 1492; L.F. 167-171).

In the punishment phase of trial, the state adduced evidence concerning appellant's prior criminal offenses (Tr. 1511-1583), and victim impact testimony from the survivors of Anthony Curtis (Tr. 1588-1594). Appellant presented the testimony of ten friends and family members

in attempted mitigation of punishment (Tr. 1596-1628). Thereafter, the jury returned a sentence of death against appellant for the murder of Anthony Curtis, finding two statutory aggravating circumstances as a basis for consideration of capital punishment (Tr. 1658-1660, 1663-1672; L.F. 190). Appellant was also sentenced as a persistent offender to three life sentences for first degree assault and two counts of armed criminal action, and thirty years imprisonment for first degree burglary, all sentences to run consecutively (Tr. 1686; L.F. 211-212). Appellant brings this appeal from his convictions and sentences.

POINTS RELIED ON

IA.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO ESTABLISH THAT APPELLANT DELIBERATED UPON THE MURDER OF ANTHONY CURTIS IN THAT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT, THE JURY COULD REASONABLY INFER THAT APPELLANT WENT TO THE HOME OF TERRI COLE TO MURDER COLE, AND COOLLY REFLECTED UPON THE MURDER OF CURTIS WHEN HE DISCOVERED THAT CURTIS WAS ALSO IN THE HOUSE.

State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999);

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997), cert. denied 522 U.S. 1150 (1998);

State v. Mallett, 732 S.W.2d 527 (Mo. banc 1987), cert. denied 484 U.S. 933 (1987).

IB.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCE OF DEATH BECAUSE (1) IT WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR, (2) THE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY ARE SUPPORTED BY THE EVIDENCE; AND (3) APPELLANT'S SENTENCE IS NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES, CONSIDERING THE CRIME, THE STRENGTH OF THE EVIDENCE AND THE DEFENDANT.

State v. Wolfe, 13 S.W.3d 248 (Mo. banc 2000), cert. denied 531 U.S. 845 (2000);

State v. Roberts, 948 S.W.2d 577 (Mo. banc 1997), cert. denied 522 U.S. 1056 (1998);

State v. Barton, 998 S.W.2d 19 (Mo. banc 1999), cert. denied 528 U.S. 1121 (2000);

State v. Clayton, 995 S.W.2d 468 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999).

II.

IN VIEW OF THE FACT THAT NONE OF THE NUMEROUS ALLEGATIONS OF ERROR CONTAINED IN APPELLANT'S POINT II WERE RAISED BY OBJECTION AT TRIAL OR IN APPELLANT'S MOTION FOR NEW TRIAL, AND GIVEN THE IMPROPERLY MULTIFARIOUS NATURE OF THIS POINT, THE CLAIMS ADVANCED IN THAT POINT SHOULD NOT BE REVIEWED FOR PLAIN ERROR.

IN ANY EVENT, THE CIRCUIT COURT DID NOT COMMIT MANIFEST INJUSTICE IN DECLINING TO INTERVENE SUA SPONTE IN THE STATE'S GUILT-PHASE CLOSING ARGUMENT, AND IN THE TESTIMONY OF STATE'S WITNESS TERRI COLE, BECAUSE THE ARGUMENTS AND ITEM OF EVIDENCE COMPLAINED OF BY APPELLANT WERE PROPER, AND IN ANY EVENT COULD NOT HAVE HAD A DECISIVE EFFECT ON THE JURY.

State v. Chaney, 967 S.W.2d 47 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998);

State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999);

State v. Clayton, 995 S.W.2d 468 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999).

III.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 565.005, RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ERR OR COMMIT MANIFEST INJUSTICE IN DECLINING TO PRECLUDE, SUA SPONTE, A SENTENCE OF DEATH AGAINST APPELLANT BECAUSE THE HOLDING OF APPRENDI V. NEW JERSEY DOES NOT REQUIRE THAT STATUTORY AGGRAVATING CIRCUMSTANCES BE PLED IN THE INDICTMENT OR INFORMATION IN THAT (A) APPRENDI DID NOT ADDRESS WHAT MUST BE PLED IN AN INDICTMENT OR INFORMATION, AND (B) BY ITS EXPRESS TERMS, THIS DECISION DOES NOT APPLY TO CAPITAL SENTENCING.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000);

State v. Black, 50 S.W.3d 778 (Mo. banc 2001);

United States v. Sanchez, 2001 U.S.App.Lexis 22406 (11th Cir. banc October 17, 2001).

IV.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 565.032.2(7), RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ERR OR COMMIT MANIFEST INJUSTICE IN DECLINING TO PRECLUDE, SUA SPONTE, THE SUBMISSION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF ANTHONY CURTIS WAS OUTRAGEOUSLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED DEPRAVITY OF MIND BECAUSE THIS STATUTORY AGGRAVATING CIRCUMSTANCE WAS NOT UNCONSTITUTIONALLY VAGUE IN THAT A LIMITING CONSTRUCTION OF "DEPRAVITY OF MIND" WAS SUBMITTED TO THE JURY THAT GAVE SUFFICIENT GUIDANCE AS TO THE SCOPE OF THIS STATUTORY AGGRAVATING CIRCUMSTANCE.

State v. Johns, 34 S.W.3d 93 (Mo. banc 2000), cert. denied 121 S.Ct. 1745 (2001);

State v. Johnson, 22 S.W.3d 183 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000);

State v. Knese, 985 S.W.2d 759 (Mo. banc 1999), cert. denied 526 U.S. 1136 (1999);

State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999).

V.

IN VIEW OF APPELLANT'S FAILURE TO CHALLENGE AT TRIAL ALL OF THE RACE-NEUTRAL REASONS GIVEN BY THE STATE FOR IT EXERCISE OF A PEREMPTORY CHALLENGE ON VENIREMAN VERNARD CHAMBERS, APPELLANT FAILED TO BEAR HIS BURDEN OF ESTABLISHING THAT CHAMBERS WAS EXCUSED SOLELY ON ACCOUNT OF HIS RACE IN VIOLATION OF BATSON V. KENTUCKY.

MOREOVER, THE CIRCUIT COURT WAS NOT CLEARLY ERRONEOUS IN OVERRULING APPELLANT'S BATSON CHALLENGE BECAUSE THE PROSECUTION PROVIDED SPECIFIC RACE-NEUTRAL EXPLANATIONS FOR STRIKING THIS VENIREPERSON, AND THE COURT REASONABLY CONCLUDED FROM ALL OF THE FACTS AND CIRCUMSTANCES BEFORE IT THAT THESE EXPLANATIONS WERE CREDIBLE AND NOT PRETEXTUAL.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1985);

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 874 (1995);

State v. Parker, 836 S.W.2d 930 (Mo. banc 1992), cert. denied 506 U.S. 1014 (1992);

State v. Barnett, 980 S.W.2d 297 (Mo. banc 1998), cert. denied 525 U.S. 1161 (1999).

VI.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 494.480.4, RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN REFUSING TO EXCUSE FOR CAUSE VENIREMAN JOSEPH CLARK BECAUSE (A) APPELLANT'S CLAIM IS FORECLOSED BY §494.480.4 IN THAT CLARK DID NOT SERVE ON APPELLANT'S JURY, HAVING BEEN REMOVED FROM THE PANEL BY PEREMPTORY CHALLENGE, AND APPELLANT WAS NOT ENTITLED TO A "FULL PANEL OF QUALIFIED JURORS" BEFORE EXERCISING HIS PEREMPTORY STRIKES; AND (B) THE TRIAL COURT REASONABLY CONCLUDED FROM CLARK'S TESTIMONY THAT HE COULD SERVE AS A FAIR AND IMPARTIAL JUROR.

Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988);

State v. Richardson, 923 S.W.2d 301 (Mo. banc 1996), cert. denied 519 U.S. 972 (1996);

State v. Gray, 887 S.W.2d 369 (Mo. banc 1994), cert. denied 514 U.S. 1042 (1995).

VII.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN DECLINING TO EXCLUDE, SUA SPONTE, EVIDENCE PRESENTED BY THE STATE IN THE PUNISHMENT PHASE OF TRIAL REGARDING APPELLANT'S PREVIOUS CRIMINAL ACTS AND CONVICTIONS BECAUSE THIS EVIDENCE WAS RELEVANT TO THE ISSUE OF APPELLANT'S PUNISHMENT IN THAT IT DEMONSTRATED APPELLANT'S HISTORY OF UNLAWFUL AND DANGEROUS CONDUCT, MUCH OF IT DIRECTED AGAINST HIS THEN-WIFE, TERRI COLE, AND THE FACT THAT HE CONTINUED THIS CONDUCT DESPITE MULTIPLE CRIMINAL CONVICTIONS.

State v. Christeson, 50 S.W.3d 251 (Mo. banc 2001);

State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999);

State v. Nicklasson, 967 S.W.2d 596 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998);

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1966).

VIII.

IN VIEW OF THE FACT THAT APPELLANT DID NOT ATTEMPT TO ASK THE DEFENSE WITNESSES IN THE PUNISHMENT PHASE WHETHER THEY WOULD VISIT APPELLANT IN PRISON, BUT INSTEAD CHOSE TO ASK A DIFFERENT QUESTION AFTER A MOTION IN LIMINE WAS SUSTAINED AS TO THE ABOVE INQUIRY, APPELLANT CANNOT LEGITIMATELY CLAIM THAT THE TRIAL COURT ERRED IN "REFUSING TO ALLOW" THIS INQUIRY.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN SUSTAINING THE STATE'S MOTION IN LIMINE BECAUSE WHETHER APPELLANT'S FRIENDS AND RELATIVES WOULD VISIT HIM IN PRISON WAS IRRELEVANT TO THE ISSUE OF PUNISHMENT IN THAT IT HAD NO BEARING ON APPELLANT'S CHARACTER OR HIS MORAL CULPABILITY FOR HIS CRIMES.

State v. Nicklasson, 967 S.W.2d 596 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998);

State v. Purlee, 839 S.W.2d 584 (Mo. banc 1992);

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);

State v. Schneider, 736 S.W.2d 392 (Mo. banc 1987), cert. denied 484 U.S. 1047 (1988).

IX.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE SUBMISSION IN THE PUNISHMENT PHASE OF THE "LIFE OPTION" INSTRUCTION, MAI-CR 3D 313.46A, BECAUSE THIS INSTRUCTION DID NOT MISINFORM THE JURY ON THE LAW IN THAT, WHEN READ WITH THE PUNISHMENT-PHASE INSTRUCTIONS AS A WHOLE, IT DID NOT INSTRUCT THE JURY THAT IT COULD DISREGARD MITIGATING EVIDENCE.

State v. Storey, 40 S.W.3d 898 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001); State v. Debler, 856 S.W.2d 641 (Mo. banc 1993).

X.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE SUBMISSION IN THE PUNISHMENT PHASE OF THE VERDICT MECHANICS INSTRUCTION, MAI-CR 3D 313.48A, BECAUSE THIS INSTRUCTION DID NOT MISLEAD THE JURY INTO BELIEVING THAT IT WAS NOT REQUIRED TO FIND THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT OUTWEIGHED THE EVIDENCE IN MITIGATION OF PUNISHMENT BEFORE RETURNING A SENTENCE OF DEATH IN THAT (A) THIS INSTRUCTION DID NOT PURPORT TO LIST ALL OF THE STEPS IN THE CAPITAL SENTENCING PROCESS, AND (B) THE JURY WAS SEPARATELY INSTRUCTED THAT IT WAS REQUIRED TO FIND THAT THE AGGRAVATING EVIDENCE OUTWEIGHED THE MITIGATING EVIDENCE BEFORE IT COULD ASSESS A DEATH SENTENCE.

State v. Storey, 40 S.W.3d 898 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

ARGUMENT

IA.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE BECAUSE SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO ESTABLISH THAT APPELLANT DELIBERATED UPON THE MURDER OF ANTHONY CURTIS IN THAT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT, THE JURY COULD REASONABLY INFER THAT APPELLANT WENT TO THE HOME OF TERRI COLE TO MURDER COLE, AND COOLLY REFLECTED UPON THE MURDER OF CURTIS WHEN HE DISCOVERED THAT CURTIS WAS ALSO IN THE HOUSE.

Point I of the appellant's brief contains two legally-distinct claims of error: first, that the evidence presented at trial was insufficient to establish that appellant deliberated upon the murder of Anthony Curtis; and second, that appellant's sentence of death should be reduced by this Court based in part upon the claim that the proof of his deliberation was "unreliable" (App.Br. 30-37). Since the standards of review by which these legal issues are examined are different, respondent will address them in separate subpoints.

In reviewing a claim of insufficiency of evidence, an appellate court accepts as true the evidence in the light most favorable to the state, affording the state all reasonable inferences drawn from the evidence and disregarding contrary evidence and inferences. State v. Goodwin, 43 S.W.3d 805, 815 (Mo. banc 2001); State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998). Proof of the intent element of deliberation, defined in

§565.002(3), RSMo 2000 as "cool reflection for any length of time no matter how brief," must ordinarily be proven through the circumstances surrounding the crime. State v. Ferguson, 20 S.W.3d 485, 497 (Mo. banc 2000), cert. denied 531 U.S. 1019 (2000).

The evidence at trial provides ample support for the inference that appellant came to the home of Terri Cole with the deliberate intention of killing her: he had previously threatened her life, he approached her house by stealth and entered it by force, and he brought two deadly weapons that could be (and one of which ultimately was) used in a homicide. Appellant argues that the evidence of this preexisting plan is irrelevant to the sufficiency of his conviction for the deliberated murder of Anthony Curtis because he did not know Curtis and had no reason to be aware that Curtis would be in the house (App.Br. 36). Not so. The jury could reasonably infer that, upon encountering Curtis in his ex-wife's house, he realized that he could not murder her without first killing Curtis, and that he coolly reflected upon the murder of Curtis at that time.

This inference is supported by three evidentiary facts:

1. Appellant's Sustained Assault on Curtis

Appellant did not stab Curtis once or twice, but committed a sustained attack upon the victim lasting several minutes and in which Curtis suffered twenty-one knife wounds (Tr. 687-700, 705-706, 991). Thirteen of Curtis's injuries were "defense wounds" to his hands as he tried to ward off appellant's knife thrusts (Tr. 687-691, 700-701; S.Ex. 80-80C, 81-81B). The victim was also stabbed eight times in his head and torso (Tr. 691-700; S.Ex. 79, 82-87); five of these wounds penetrated four or more inches into his body and several of them, including

the fatal wound, struck bone and required considerable force to inflict (Tr. 698-700, 702, 706; S.Ex. 79).

Evidence of multiple wounds or repeated blows may support an inference of deliberation. State v. Ervin, 979 S.W.2d 149, 159 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999); State v. Clay, 975 S.W.2d 121, 139 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). Here, appellant not only inflicted multiple wounds, but he pressed his knife attack against prolonged resistance by Curtis, and struck with such force that he repeatedly sheared through the bones of the victim.

2. Appellant's Attack After Curtis Was Incapacitated

After an extended struggle, Curtis fell face-down on the floor (Tr. 920-923). Instead of ceasing his attack, appellant stooped over the victim and stabbed him a number of additional times in the back (Tr. 921-922). Several of these stab wounds were clustered in such a manner as to indicate that Curtis was not moving when he was stabbed (Tr. 703; S.Ex. 83A). One of the wounds to the victim's back was the stab wound that penetrated eight inches into his body, cutting his aorta and causing his death (Tr. 699, 702; S.Ex. 79).

Deliberation may be inferred from the fact that the defendant had an opportunity to terminate an attack after it began. State v. Ervin, supra; State v. Johnston, 957 S.W.2d 734, 747-748 (Mo. banc 1997), cert. denied 522 U.S. 1150 (1998). This is particularly true when an attack is made or continued against an incapacitated victim. State v. Johns, 34 S.W.3d 93, 111 (Mo. banc 2000), cert. denied 121 S.Ct. 1745 (2001); State v. Mallett, 732 S.W.2d 527, 533 (Mo. banc 1987), cert. denied 484 U.S. 933 (1987). The fact that appellant continued to

stab the unresisting Curtis "refutes any theory of lack of deliberation." State v. Driscoll, 2001 Mo.Lexis 75 (Mo. banc September 11, 2001) at *18 (stabbing of helpless victim).

3. Appellant's Conduct After the Fatal Stabbing of Curtis

Contrary to appellant's assertion (App.Br. 35), his conduct after the stabbing is also relevant in determining whether or not he deliberated upon the murder of Curtis. See, e.g., State v. Feltrop, 803 S.W.2d 1, 12 (Mo. banc 1991), cert. denied 501 U.S. 1262 (1991) (failure to seek medical assistance for victim); State v. Williams, 945 S.W.2d 575, 580 (Mo.App., W.D. 1997) (disposing of the murder weapon). Here, after mortally wounding Curtis, appellant resumed what the jury could reasonably infer to have been his preexisting plan: to kill his ex-wife, Terri Cole. This conduct bolsters the conclusion that, upon encountering Curtis, appellant resolved to kill him because he was an obstacle to appellant's intended murder of Cole.

Appellant's failure to seek medical assistance for Curtis after their altercation, and his subsequent flight from the state and destruction of evidence, also support the jury's finding that he deliberated upon Curtis's murder. State v. Feltrop, supra; State v. Williams, supra; State v. Moore, 949 S.W.2d 629, 633 (Mo.App., W.D. 1997).

In arguing that the evidence at trial fails to show deliberation, appellant repeatedly asserts that he was "angry" and "enraged" about his child support obligations when he entered Cole's house (App.Br. 31, 33-36). Even if this alleged anger had anything to do with Anthony Curtis–which it did not–the fact that appellant resented paying child support is in no way inconsistent with a finding that appellant acted with deliberation in killing Curtis. The concept

of deliberation, as it has existed in this state for a century and a half,[2] has never required that a person be devoid of emotion in order to act with deliberation. Rather, it has required only that the decision to kill was made after "cool reflection"or in a "cool state of blood," meaning that the homicidal intent was a free act of the will rather than the product of passion. State v. Davis, 400 S.W.2d 141, 145-146 (Mo. 1966); State v. Anderson, 384 S.W.2d 591, 608 (Mo. 1964); see §565.020.1, RSMo 2000 (deliberation "upon the matter"). Whatever the state or degree of appellant's longstanding anger about paying child support, the jury had an ample basis to infer that he had coolly considered and decided upon the murder of Terri Cole when, after threatening her life, he crept up to her house with weapons and instruments for committing that crime; and that he engaged in the same cool reflection with regard to Anthony Curtis upon discovering Curtis in the house. Therefore, the trial court could not have erred in overruling appellant's motion for acquittal.

[2]See Article II, §1, RSMo 1835. The statutory definition of deliberation, enacted in 1984, was a codification, not a modification, of the existing law on that subject. Compare §565.002(3) with State v. McDonald, 661 S.W.2d 497, 501 (Mo. banc 1983), cert. denied 471 U.S. 1009 (1985); and State v. Ingram, 607 S.W.2d 438, 443 (Mo. 1980).

IB.

THIS COURT SHOULD, IN THE EXERCISE OF ITS INDEPENDENT REVIEW, AFFIRM APPELLANT'S SENTENCE OF DEATH BECAUSE (1) IT WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR, (2) THE STATUTORY AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY ARE SUPPORTED BY THE EVIDENCE; AND (3) APPELLANT'S SENTENCE IS NOT EXCESSIVE OR DISPROPORTIONATE TO THOSE IN SIMILAR CASES, CONSIDERING THE CRIME, THE STRENGTH OF THE EVIDENCE AND THE DEFENDANT.

As an alternative to his attack upon the sufficiency of the evidence, appellant invokes this Court's duty of independent sentence review under §565.035.3, RSMo 2000, arguing that the evidence that he deliberated upon the murder of Anthony Curtis was "unreliable" and citing various of his claims of trial error as evidence that his punishment-phase hearing was unfair (App.Br. 30-32, 37). Contrary to the assertions in appellant's brief (App.Br. 32, 37), the proportionality review conducted by this Court is not a requisite under the due process clause, or under any other provision of the United States Constitution. Morrow v. State, 21 S.W.3d 819, 829-830 (Mo. banc 2000), cert. denied 531 U.S. 1171 (2001).[3]

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[3]Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), cited by appellant, does not support his claim: this decision concerned the review of punitive damage awards and did not purport to overrule, modify or even address Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), which held

In arguing that his sentence of death should be reduced, appellant offers no dispute that the two statutory aggravating circumstances found by the jury were supported by the evidence. Section 565.035.3(2). His allegation that the punishment verdict was the result of "passion, prejudice or any other arbitrary factor," §565.035.3(1) rests upon the claims of error advanced in Points II and VII of the appellant's brief (App.Br. 31-32). For the reasons stated in respondent's Point's II and VII, infra, appellant's argument is meritless.[4]

As to whether appellant's sentence of death was "excessive or disproportionate to the penalty imposed in similar cases, considering . . . the crime, the strength of the evidence and the defendant," §565.035.3(3), the murder of Anthony Curtis resembles the crimes committed in State v. Wolfe, 13 S.W.3d 248, 265 (Mo. banc 2000), cert. denied 531 U.S. 845 (2000); and State v. Roberts, 948 S.W.2d 577, 607 (Mo. banc 1997), cert. denied 522 U.S. 1056 (1998) in that the murder was committed after he had invaded a home for the purpose of committing

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that proportionality review is not constitutionally required in an otherwise valid capital sentencing system.

[4]Appellant also cites Cooper Industries, Inc. v. Leatherman Toolgroup, Inc., supra, for the proposition that the alleged trial errors he cites should be considered "in evaluating the reliability and proportionality of the verdict of death" (App.Br. 32). Cooper Industries has nothing whatsoever to say on this issue. Appellant's argument is superfluous, however, because §565.035.3(1) already directs this Court to review the record for "arbitrary factor[s]" that could have caused the trier of fact to assess punishment based upon something other than the relevant facts and law.

a crime, in this case the murder of Terri Cole. As in such cases as State v. Barton, 998 S.W.2d 19, 29 (Mo. banc 1999), cert. denied 528 U.S. 1121 (2000); and State v. Clayton, 995 S.W.2d 468, 484 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999), appellant murdered a person who was defenseless: Anthony Curtis was wounded and lying face-down on the floor when he was stabbed multiple times in the back and killed. And it is only through the sheerest chance–and not from a lack of effort on appellant's part–that there were not two homicide victims, rather than one, from his attack. See State v. Johnson, 22 S.W.3d 183, 193 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000) (proportionality review in multiple homicides).

Appellant's argument that the proof of his deliberation in murdering Anthony Curtis was deficient has been addressed in respondent's Point IA, supra. Deliberation does not require that an actor brood over his or her actions for a long period of time, State v. Knese, 985 S.W.2d 759, 769 (Mo. banc 1999), cert. denied 526 U.S. 1136 (1999), and appellant's conduct while assaulting Curtis–particularly the fact that appellant killed the victim by stabbing him multiple times in the back as he lay face-down on the floor–amply demonstrates a deliberative intent. Appellant's assertion that he was "angry" and "enraged" about paying child support does nothing to negate that intent. Therefore, the strength of the evidence does not support appellant's argument that his sentence is excessive.

The sentence assessed by the jury is also supported by appellant's own history and conduct. The punishment-phase evidence showed him to be a three-time felon and a serial spousal abuser who had demonstrated his capacity for violence long before his murder of Anthony Curtis (Tr. 1511-1583).

Viewing the trial record as a whole, it cannot be said that appellant's murder of Anthony Curtis is "plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Ramsey, 864 S.W.2d 320, 327-328 (Mo. banc 1993), cert. denied 511 U.S. 1078 (1994). Accordingly, appellant's sentence of death should be affirmed.

II.

IN VIEW OF THE FACT THAT NONE OF THE NUMEROUS ALLEGATIONS OF ERROR CONTAINED IN APPELLANT'S POINT II WERE RAISED BY OBJECTION AT TRIAL OR IN APPELLANT'S MOTION FOR NEW TRIAL, AND GIVEN THE IMPROPERLY MULTIFARIOUS NATURE OF THIS POINT, THE CLAIMS ADVANCED IN THAT POINT SHOULD NOT BE REVIEWED FOR PLAIN ERROR.

IN ANY EVENT, THE CIRCUIT COURT DID NOT COMMIT MANIFEST INJUSTICE IN DECLINING TO INTERVENE SUA SPONTE IN THE STATE'S GUILT-PHASE CLOSING ARGUMENT, AND IN THE TESTIMONY OF STATE'S WITNESS TERRI COLE, BECAUSE THE ARGUMENTS AND ITEM OF EVIDENCE COMPLAINED OF BY APPELLANT WERE PROPER, AND IN ANY EVENT COULD NOT HAVE HAD A DECISIVE EFFECT ON THE JURY.

Under a single Point Relied On, appellant offers eighteen pages of argument, raising more than a dozen complaints about the state's guilt-phase closing argument and one item of guilt-phase evidence (App.Br. 38-56). The only thing that these claims have in common is that not a single one of them was raised by objection at trial, or in appellant's Motion for New Trial. This conglomeration of unrelated allegations is an extreme example of a point containing "multifarious" allegations of error in violation of Supreme Court Rule 30.06. State v. Thompson, 985 S.W.2d 779, 784 (n. 1) (Mo. banc 1999); Thummel v. King, 570 S.W.2d 679, 688 (Mo. banc 1978).

Appellant's grab-bag of newly-offered complaints flies in the face of the principle that

the plain error rule should be used sparingly and does not warrant unlimited review of unpreserved claims. State v. Ringo, 30 S.W.3d 811, 821 (Mo. banc 2000), cert. denied 121 S.Ct. 1381 (2001). Statements made during closing argument seldom amount to plain error, and an assertion that the trial court should have gratuitously intervened overlooks the fact that an absence of objection may well have been strategic on the part of defense counsel. State v. Clayton, 995 S.W.2d 468, 478-479 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999). This Court has in the past declined invitations to conduct wholesale examinations of unpreserved claims. E.g., State v. Chaney, 967 S.W.2d 47, 59 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998). It should do the same here.

In the event that this Court elects to examine appellant's laundry list of newly-raised claims, the following facts demonstrate their absence of merit.

A. Terri Cole's Fear of Appellant

In the course of describing the injuries inflicted upon her from appellant's knife attack, Terri Cole testified that, after her discharge from the hospital, she stayed with her sister during the month when appellant was a fugitive from justice (Tr. 935). Reference was also made in the state's closing argument to the fact that Cole was afraid of appellant after he had stabbed her:

> From the injuries they sustained, no matter where they went, there was going to be a blood trail. I'll ask you to reflect back upon Officer Vaughn when he told you when he arrived, Terri Cole's voice [was] quivering, she's leaning against the wall, she's leaning against the wall, she is frightened and she was

afraid. That's because she didn't know if he was coming back.

Tr. 1434. For the first time on appeal, appellant claims that this testimony and argument was a suggestion by the state that appellant would commit future crimes (App.Br. 40).

The fact that Terri Cole was afraid of appellant after having been stabbed multiple times and nearly killed by him was a crashing obviosity, not a suggestion of appellant's future dangerousness. No evidence or argument was offered by the prosecution that appellant made any further effort to attack his ex-wife–to the contrary, the state and defense were in agreement that appellant fled after the attack and later surrendered to police (Tr. 1067-1082, 1280-1286). Similar facts were presented in State v. Morrow, 968 S.W.2d 100 (Mo. banc 1998), cert. denied 525 U.S. 896 (1998), where a witness testified that she had hidden from the defendant after seeing him shoot a man to death. Id. at 113. This Court found no prejudice from this testimony because "it merely points out the obvious - that someone who just witnessed a murder would fear for their life." Id. The same principle applies here.

B. The Importance of the Case

The prosecutor began his initial closing argument in the following manner:

> MR. REILLY: If I might have the Court's instructions, your Honor. May it please the Court, Ms. Hirzy, ladies and gentlemen of the jury, I want to thank you for your time because this is one January 15th of 2001 and you're spending it here with us and just like you spent the last week you are giving us a most valuable asset, however, I can't think of a case that could be more important to the people of St. Louis County and to the family of Terri Cole and Terri Cole

herself and the case that you've heard here over the last week. As you reflect back on the evidence and you think about the evidence that you've heard in this case, I can't emphasize enough to you the seriousness of this case nor can I emphasize enough to you the strength of the State's case.

Tr. 1415. For the first time on appeal, appellant seizes upon the prosecutor's remarks about the importance of the case and accuses the state of thereby implying knowledge of facts outside the evidence (App.Br. 41-42). Citing State v. Storey, 901 S.W.2d 886, 900-901 (Mo. banc 1995), where error was found based in part upon a statement that the charged offense was "the most brutal slaying in the history of this county," appellant charges that the above argument "implied [that] the prosecutor was aware of facts beyond the record at trial - not known to the jury - that corroborated his decision to charge and prosecute [appellant] and to seek the death penalty" (App.Br. 41).

Nonsense. Apart from the obvious significance of this case to the victims and their survivors, it is undisputable that no prosecution can be more important to the citizens of any community than one in which the state charges the defendant with first degree murder and seeks the death penalty. As in Bucklew v. State, 38 S.W.3d 395 (Mo. banc 2001), where the prosecutor asked the jury, "[w]ho deserves the death penalty if not this sociopathic killer?", the statements in the case at bar "do not imply special knowledge, but are rhetorical [arguments] based on the evidence" (citation omitted). Id. at 400. Moreover, this Court has noted that its holding in Storey was not based upon any single statement by the prosecutor, but upon a series of "egregiously" improper arguments. State v. Basile, 942 S.W.2d 342, 352-353 (Mo. banc

1997), cert. denied 522 U.S. 883 (1997). No such misconduct is present here.

C. References to Appellant's Prior Convictions

The key contested issue at trial was the credibility of the conflicting accounts of Terri Cole and appellant about the events on the night of August 21, 1998. As set out in respondent's Statement of Facts, supra, Terri Cole described how she and Anthony Curtis were eating and watching a movie when appellant broke into her house and assaulted both of them with a knife. Appellant's story was that he never had a knife and that Curtis and Terri Cole stabbed one another. Apart from its sheer implausibility in light of the victims' wounds and other physical evidence, the testimony of appellant was impeached by the fact that he had three prior felony and one prior misdemeanor convictions (Tr. 1290, 1346-1348).

In its initial closing argument, the state addressed the conflicting stories as to who stabbed Anthony Curtis:

> Ladies and gentlemen, Anthony Curtis, the guy from the museum, just getting a job at Boeing or McDonnell Douglas, eating Taco Bell and watching movies. You'll see the Blockbuster boxes and Taco Bell boxes. They're so absorbed and an attacker, a convicted felon with priors, is sneaking around at night, smashing windows with a jack. Or is it the mom, who is laying on the couch watching a movie and with the man who is eating Taco Bell. Who do you think is attacking?

Tr. 1421.

Virtually the entire defense argument was devoted to the claim that Terri Cole was lying

in her testimony about appellant's attack (Tr. 1441-1464). In rebuttal, the state argued in relevant part as follows:

> We hear about the going back and forth, nothing has been done about it, something should have been done about it. We also heard he pled guilty to violations of an exparte order. We know he pled guilty to other crimes as well. You can't tell me nothing was done about it. In the end he made a decision, just as I told you in opening statement, he made a serious, deliberate decision before, during and after this happened and he continued to make them all the way up until the time he turned himself into jail. . . .
>
> . . . . He wouldn't admit a thing. He accused Terri Cole of committing it. [Defense counsel] was talking about how would she be powerful enough to inflict these injuries on a two hundred and thirty pound man. When you can think about the sheer violence of the crime, we know he's a convicted felon, we know he's destroyed evidence and runs, you think he's not going to lie to you. The Defendant is presumed to be innocent. That does not mean he's presumed to be truthful. . . .
>
> * * *
>
> Do not forget that he lied when you look at this case. Don't think somebody who killed wouldn't come in and lie. I'm going to ask you to think about two worlds have collided. Anthony Curtis, a tour guide from the museum. You can take that picture of Terri Cole. It shows her after the attack. She's

> Marcus' mom. She's Anthony's mom. She's a mom who worked for a health company doing clerical work and he's a convicted killer [*sic*]. He wants to make her an attacker and they were sitting in the house with an alarm.

Tr. 1476-1478.

Appellant's newly-minted accusation that the prosecutor's references to his prior convictions were "pure propensity argument urging the jury to use [appellant's] prior convictions to convict him" (App.Br. 43) is not supported from a review of the arguments quoted above. Although it is improper to use a defendant's prior convictions as substantive evidence of his guilt, State v. Jacobs, 939 S.W.2d 7, 11 (Mo.App., W.D. 1997), it is entirely permissible to cite them in support of an argument that the defendant was untruthful in his testimony. Id.; §491.050, RSMo 2000. While the prosecutor's arguments are not a model of clarity, his references to appellant's convictions are closely associated with arguments to the jury that appellant was lying or was unworthy of belief.

Appellant does not acknowledge these contemporaneous credibility arguments, instead choosing to offer an interpretation of the prosecutor's statements that supports a claim of purposeful misconduct (App.Br. 43-47). However, appellate courts "will not lightly infer that the State intends an ambiguous remark to have its most damaging meaning, or that a jury, sitting through lengthy arguments, will draw a damaging meaning from among other, less damaging interpretations" (citation omitted). State v. Griggs, 999 S.W.2d 235, 246 (Mo.App., W.D. 1998). The absence of a defense objection by one who heard, rather than read, these arguments itself suggests that they were legitimate attacks upon appellant's credibility as a witness.

Appellant also complains that, after making several correct references to the fact that appellant was a "convicted felon" (Tr. 1421, 1477), the prosecutor misspoke on one occasion by calling him a "convicted killer" (Tr. 1478; App.Br. 44). This misstatement, while erroneous, could not possibly have prejudiced appellant because the precise nature of his prior convictions–including the fact that none of them involved a homicide–was presented as evidence to the jury (Tr. 1290, 1346-1348). Equally obvious slips of the tongue were found not to be manifest injustice in State v. Ferguson, 20 S.W.3d 485, 502-503 (Mo. banc 2000), cert. denied 531 U.S. 1019 (2000); and State v. Debler, 856 S.W.2d 641, 648 (Mo. banc 1993).

D. Arguments on Deliberation

Despite the absence of a single trial objection, appellant charges on appeal that the state's attorney made improper arguments on the issue of deliberation "[t]hroughout his closing argument" (App.Br. 48). As nearly as respondent can tell from the "representative quotes" offered in appellant's brief (App.Br. 48-50), his complaints are (1) that the state should not have been permitted to argue that evidence that appellant deliberated upon the intended killing of Terri Cole also tended to show that he deliberated in the murder of Anthony Curtis (Tr. 1417, 1419-1420, 1422-1424), and (2) that reference to the fact that appellant was delinquent in his child support payments (Tr. 1417, 1422, 1435) was "bad character evidence."[5]

[5]Appellant offers no record citation to any argument he claims to be improper on this ground other than the "representative quotes." He attaches 96 pages of the state's closing arguments as an Appendix with handwritten marks and notations, most of which have no

Appellant is mistaken on both counts. As discussed in respondent's Point IA, supra, appellant's initial scheme to kill Terri Cole was relevant to establish that he deliberated upon the murder of Anthony Curtis in that the jury could reasonably infer from the evidence that, upon encountering Curtis in the house, appellant decided that he had to kill Curtis to carry out that scheme. The fact that appellant was delinquent in his child support payments was not "bad character evidence," but evidence of deliberation (in light of his statement that "before I give [Terri Cole] another dime I'll kill the bitch"), as well as of appellant's motive to break into Cole's house with a knife and a loaded pistol.

E. References to Terri Cole

After appellant's counsel occupied most of her closing argument calling Terri Cole a liar and suggesting that she had stabbed Anthony Curtis (Tr. 1441-1464), the prosecutor began his rebuttal argument as follows:

> MR. REILLY: Now, its interesting. Sometimes people will try to turn the world on its head and that's what you have just heard. I think it's somewhat ironic. Not only was Terri Cole attacked in her house, a friend murdered, she has to raise her boys in that same house where he murdered a friend and tried to kill her and wouldn't talk about that, not only did that happen, she had to go

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obvious relevance to his claim of error. It should not be the duty of this Court, or of respondent, to troll through appellant's Appendix and guess which notations are the subject of his claim of error. See State v. Conaway, 912 S.W.2d 92, 96 (Mo.App., S.D. 1995) ("Judges are not like pigs, hunting for truffles buried in briefs").

through a laparotomy and everything else you heard about and they have the gall to come in and accuse her. He wouldn't even admit he stepped foot in that house."

Tr. 1465-1466. Appellant's belated notion that this argument punished appellant for exercising his right to present a "vigorous defense" at trial (App.Br. 52) is preposterous: the prosecutor was "punishing" appellant for falsely accusing Terri Cole of murder, as he had every right to do. The state was entitled to comment on the credibility of appellant's testimony, State v. Hall, 982 S.W.2d 675, 683 (Mo. banc 1998), cert. denied 526 U.S. 1151 (1999), and ample basis existed in the evidence to support the prosecutor's inference that appellant was lying. An accused has a constitutional right to testify, but not a right to testify falsely. Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Therefore, the state was not punishing appellant for the exercise of his constitutional rights.

Appellant also complains that the prosecutor said, at the conclusion of his rebuttal argument, "[d]on't tell Terri Cole, a dying woman, by your verdict that she is a liar" (Tr. 1480). At the time of trial, Cole was suffering from ALS, also known as "Lou Gehrig's Disease"; this fact was elicited during her testimony (Tr. 910, 953), and several references were also made to it in the defense argument (Tr. 1442, 1446-1447).[6] Cole's medical condition should not have been mentioned in the argument quoted above–it was not relevant to the prosecutor's contention that she was a credible witness–but it was a fact known to the jury and was

[6]It was stipulated before the jury during the punishment phase that Ms. Cole's illness was not the result of the injuries inflicted upon her by appellant (Tr. 1555).

previously cited in defense argument, so this reference could not possibly have had a "decisive effect" upon the jury. State v. Clayton, supra, 995 S.W.2d at 479.

E. Reference to Appellant's Mistakes in Committing the Crimes

Among the various theories offered by the defense in its closing argument was that appellant was an intelligent person and would not have been foolish enough to go to his ex-wife's house and attempt to kill her after announcing his intention in advance ("before I give her another dime I'll kill the bitch"), and that the fact that Terri Cole was still alive to testify was evidence that appellant did not plan or perpetrate such a scheme:

> They want you to believe [that] . . . he went to kill her and announced his intention all over the place. Maybe they could have found six other people to testify to the same thing. I don't know. It never happened. He never said that. He says he's not stupid. No, he's not stupid. He's articulate. He's intelligent. You plan to kill someone because you don't want to pay anymore child support, you go out and you kill them. Did he kill her, did he?
>
> . . . . Did he kill her? No, if their version is correct, that the motive for going to Terri Cole's house that Friday night because he got another garnishment on his wages, which had been happening since 1996, four years, then why didn't he do it? Why didn't he kill her. Good question. Good question.

Tr. 1443. In rebuttal, the prosecutor responded to these theories:

> What we do know is his actions are deliberate. When she says it's ludicrous, maybe it is to you and me. To him it's deliberate. He's not an

> imbecile but he's not a rocket scientist. People sitting in that chair (indicating), ladies and gentlemen, are usually there for a reason. They may not be a rocket scientist, they're deliberate and calculating and do the best they can with the mayhem they create. That's why I tell you about him when Ms. Hirzey tells you why isn't she dead, why isn't she dead. . . . [h]e had to spend time attacking Anthony Curtis. I'll tell you the other thing. When he left her, remember that alarm is going off when he left her, she was on the ground gasping for air. He knew the clock was ticking and he did his best.

Tr. 1474.

Appellant omits the defense argument quoted above and alleges, inaccurately, that when the prosecutor said that persons sitting in a defendant's chair "are usually there for a reason," he meant that persons are charged because they are guilty (App.Br. 54). In fact, the prosecutor was telling the jury that people frequently become criminal defendants because they were not as smart or skillful as they thought they were in committing their crimes. In the case at bar, appellant was a defendant in part because he was foolish enough to threaten Terri Cole's life in front of witnesses before going to her house for the purpose of killing her, and because (despite his best efforts) he left Cole alive to testify against him. Appellant's search for an adverse construction of the statement in question founders not only upon its context, but also upon the fact that the prosecutor repeatedly reminded the jury in its argument that appellant was presumed to be innocent until proven guilty (Tr. 1477), that the state had the burden of proof (Tr. 1419, 1437, 1466), and–during an objection to a defense argument that was

sustained by the court–that the state was not claiming that appellant was guilty merely because he was charged with a crime (Tr. 1450-1451). Appellant's claim of manifest injustice and prosecutorial misconduct is factually meritless.

Under all of the above facts and authorities, appellant could not have suffered manifest injustice from the evidence and arguments complained of.

III.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 565.005, RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ERR OR COMMIT MANIFEST INJUSTICE IN DECLINING TO PRECLUDE, SUA SPONTE, A SENTENCE OF DEATH AGAINST APPELLANT BECAUSE THE HOLDING OF APPRENDI V. NEW JERSEY DOES NOT REQUIRE THAT STATUTORY AGGRAVATING CIRCUMSTANCES BE PLED IN THE INDICTMENT OR INFORMATION IN THAT (A) APPRENDI DID NOT ADDRESS WHAT MUST BE PLED IN AN INDICTMENT OR INFORMATION, AND (B) BY ITS EXPRESS TERMS, THIS DECISION DOES NOT APPLY TO CAPITAL SENTENCING.

Under §565.005.1, RSMo 2000, the state is required to give notice to the defendant "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The state did so in this case (L.F. 28-31). For the first time on appeal, appellant asserts that under the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000), the trial court did not have "jurisdiction" to sentence him to death because the state did not plead the statutory aggravating circumstances it intended to submit in the indictment or substitute information filed against him (App.Br. 56-59). Although phrased as a challenge to the charging documents, appellant's contention is in fact

that §565.001.1 is unconstitutional under Apprendi.

Constitutional claims are waived if they are not presented to the trial court at the first opportunity. State v. Parker, 886 S.W.2d 908, 925 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995). As he concedes (App.Br. 56), appellant did not assert the purported unconstitutionality of §565.005.1 in any of his many pretrial motions, nor did he raise it in any other fashion during or after the trial. Appellant's failure to timely present this claim to the court renders it "unreviewable" absent gratuitous plain error review by this Court. State v. Parker, supra.

In any case, appellant's constitutional challenge is meritless. In Apprendi, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 530 U.S. at 490. As this language indicates, the only issue addressed by the Supreme Court in Apprendi was what facts must be found by a jury at trial. Contrary to appellant's assertion, that court did not purport to address what facts must be pled in an indictment or information; the edited quotation in appellant's brief (App.Br. 57) was not a holding, but a reference to a holding in a previous decision based not on constitutional law but upon federal statutory construction. See United States v. Sanchez, 2001 U.S.App.Lexis 22406 (11th Cir. banc October 17, 2001) at *28-*29 (holding of Apprendi did not address validity of indictments).

Moreover, the Supreme Court expressly stated in Apprendi that its holding did not prevent judges from separately determining the presence or absence of statutory aggravating

circumstances in a capital case, after a jury verdict of guilt, because the "prescribed statutory maximum" for a capital offense was already death. Id., 530 U.S. at 496-497. This Court has repeatedly recognized that Apprendi has no application to capital sentencing in this state. State v. Black, 50 S.W.3d 778, 792 (Mo. banc 2001); State v. Storey, 40 S.W.3d 898, 915 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001); State v. Johns, 34 S.W.3d 93, 114 (n. 2) (Mo. banc 2000), cert. denied 121 S.Ct. 1745 (2001).

Appellant's assertion that Missouri law creates two different crimes of first degree murder, "aggravated" and "unaggravated," with different prescribed statutory maximum punishments (App.Br. 57-59), is flatly refuted by the language of §565.020, RSMo 2000, which defines a single offense with a possible punishment of "either death or imprisonment for life without eligibility for probation or parole . . . ." Since a finding of a statutory aggravating circumstance (or its equivalent) is an absolute constitutional prerequisite for a valid sentence of death, Tuilaepa v. California, 512 U.S. 967, 971-972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), appellant's argument is in effect that every capital sentencing system in this country violates Apprendi, in direct conflict with the language of that decision. Therefore, even had the holding of Apprendi addressed what must be pled in an indictment or information, it would not mandate that statutory aggravating circumstances be contained in the charging document.

Accordingly, appellant's belated constitutional attack upon §565.005 is meritless.

IV.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 565.032.2(7), RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ERR OR COMMIT MANIFEST INJUSTICE IN DECLINING TO PRECLUDE, SUA SPONTE, THE SUBMISSION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF ANTHONY CURTIS WAS OUTRAGEOUSLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED DEPRAVITY OF MIND BECAUSE THIS STATUTORY AGGRAVATING CIRCUMSTANCE WAS NOT UNCONSTITUTIONALLY VAGUE IN THAT A LIMITING CONSTRUCTION OF "DEPRAVITY OF MIND" WAS SUBMITTED TO THE JURY THAT GAVE SUFFICIENT GUIDANCE AS TO THE SCOPE OF THIS STATUTORY AGGRAVATING CIRCUMSTANCE.

In determining that appellant was eligible for a sentence of death, the jury found the existence of two statutory aggravating circumstances beyond a reasonable doubt: that appellant murdered Anthony Curtis while engaged in the perpetration of the crime of burglary, §565.032.2(11), RSMo 2000; and that the murder of Curtis was "outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind," §565.032.2(7) (L.F. 179-180, 190). In returning the latter statutory aggravating circumstance, the jury was instructed upon, and found, a limiting construction of the term "depravity of mind":

You can make a determination of depravity of mind only if you find that the

defendant committed repeated and excessive acts of physical abuse upon Anthony Curtis and the killing was therefore unreasonably brutal.

L.F. 179, 190. See State v. Ervin, 979 S.W.2d 149, 165-166 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999) for a summary of the law requiring a limiting construction of this statutory aggravating circumstance. The quoted language comes from MAI-CR 3d 313.40, Notes on Use 7.

Appellant contends that the trial court erred in overruling his objection to the submission of this statutory aggravating circumstance, claiming that it is unconstitutionally vague despite the limiting construction provided to the jury (App.Br. 60-66). Contrary to appellant's assertion, no defense objection was made on this ground: during the discussions of the punishment-phase instructions, the defense made only a general objection incorporating all of its pretrial motions (Tr. 1496, 1630-1631). Respondent has searched these motions (see L.F. 40-86, 132-135) and has found none that challenges the constitutionality of §565.032.2(7). Nor was such a claim advanced in appellant's Motion for New Trial (see L.F. 197-206). Constitutional claims are waived if they are not presented to the trial court at the first opportunity. State v. Parker, 886 S.W.2d 908, 925 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995).

If this Court elects to consider appellant's constitutional challenge even though it is raised for the first time on appeal, the same vagueness attack–involving the identical limiting construction–has been rejected on numerous past occasions by this Court. State v. Johns, 34 S.W.3d 93, 115 (Mo. banc 2000), cert. denied 121 S.Ct. 1745 (2001); State v. Johnson, 22

S.W.3d 183, 191 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000); State v. Knese, 985 S.W.2d 759, 778 (Mo. banc 1999), cert. denied 526 U.S. 1136 (1999); State v. Ervin, 979 S.W.2d 149, 164-165 (Mo. banc 1998), cert. denied 525 U.S. 1169 (1999). "The depravity of mind language and limiting instruction provide sufficient guidance to the sentencing jurors such that the instruction is not unconstitutionally vague" (citation omitted). Id. at 165.

Contrary to appellant's claim (App.Br. 64-65), the limiting construction given in this case has not been interpreted so as to apply to every first degree murder; it applies in instances where the victim is not merely killed, but is subjected to multiple and excessive acts of violence beyond that necessary to cause death. E.g., State v. Goodwin, 43 S.W.3d 805, 816 (Mo. banc 2001) (victim beaten, pushed down stairs and stuck multiple times in head with sledgehammer); State v. Johns, supra, 34 S.W.3d at 100 (victim shot seven times, including once in the head); State v. Butler, 951 S.W.2d 600, 606 (Mo. banc 1997) (two gunshot wounds to head). In the present case, Anthony Curtis suffered twenty-one wounds from the knife of appellant, including seven stab wounds deep into his body (Tr. 685-706; S.Ex. 79). At least three of these wounds were potentially lethal (Tr. 702). The facts of the present case are a classic illustration of the correct application of this limiting construction.

Appellant's additional assertion that the alleged invalidity of one of two statutory aggravating circumstances would entitle him to a new punishment-phase trial (App.Br. 66) is also contrary to the well-settled law of this state. State v. Goodwin, supra, 43 S.W.3d at 819-820. Therefore, his belated claim of error would not aid him even if it had merit.

V.

IN VIEW OF APPELLANT'S FAILURE TO CHALLENGE AT TRIAL ALL OF THE RACE-NEUTRAL REASONS GIVEN BY THE STATE FOR IT EXERCISE OF A PEREMPTORY CHALLENGE ON VENIREMAN VERNARD CHAMBERS, APPELLANT FAILED TO BEAR HIS BURDEN OF ESTABLISHING THAT CHAMBERS WAS EXCUSED SOLELY ON ACCOUNT OF HIS RACE IN VIOLATION OF BATSON V. KENTUCKY.

MOREOVER, THE CIRCUIT COURT WAS NOT CLEARLY ERRONEOUS IN OVERRULING APPELLANT'S BATSON CHALLENGE BECAUSE THE PROSECUTION PROVIDED SPECIFIC RACE-NEUTRAL EXPLANATIONS FOR STRIKING THIS VENIREPERSON, AND THE COURT REASONABLY CONCLUDED FROM ALL OF THE FACTS AND CIRCUMSTANCES BEFORE IT THAT THESE EXPLANATIONS WERE CREDIBLE AND NOT PRETEXTUAL.

Appellant attacks the trial court's rejection of his allegation that the exercise of peremptory challenges by the state was racially discriminatory in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and its progeny (App.Br. 66-76). Three of the nine venirepersons peremptorily struck by the prosecutor were African-American (Tr. 566), but appellant complains on appeal of the removal of only one black venireperson, Vernard Chambers (Tr. 566; Supp.L.F. 10; see App.Br. 66-69).

The following record made with regard to the excusal of venireman Chambers:

[THE COURT:] As to Mr. Chambers what is the State's reason for

exercising its [peremptory] strike?

MR. REILLY: Judge, again these are based on the same factors I stated before. In general terms Mr. Chambers – the state's primary concern with Mr. Chambers is that he is divorced [Tr. 446; Supp.L.F. 10]. And because of the facts and the dynamics of [the] case – the record should reflect the State expects that the evidence that's introduced will show that Mr. Cole was divorced from his wife Terri Cole. There was a great deal of animosity between the two of them. I'm concerned that someone who is similarly situated to Mr. Cole in that he's divorced may be sympathetic to Mr. Cole and may not be sympathetic to Terri Cole, the victim in this case.

My primary concern is I think sometimes when people are divorced there is a great deal of animosity that flows back and forth between the two parties. And I'm afraid Mr. Chambers would sympathize with the Defendant here and maybe give Terri Cole a degree of scrutiny that I'm not sure I want to be given to her in this case.

In addition to that. Your Honor, with regard to the death penalty he stated that he was not opposed to the death penalty, but [was] not sure if he could do it or not [Tr. 192-196].

Furthermore, he has a cousin doing life in prison for a murder in Michigan [Tr. 494-495].

I will say this: I would like the record to reflect that Mr. Chambers – I

like Mr. Chambers. He was a juror in a case that I tried in Division 11, State versus Leo McLaughlin [Tr. 178-179, 435, 477-478[7]]. He was a juror where a young man was charged with tampering with a victim in a felony murder prosecution or tampering with a witness, I should say, a class C felony. And he was part of a jury that returned a verdict sentencing that Defendant, a young man, to 4 years – or they recommended a sentence of 4 years in the Missouri Department of Corrections and a fine.

I found that to be a good State's oriented jury. But I'm very concerned about the fact that Mr. Chambers is divorced. And that's why I'm striking him.

THE COURT: Any response on behalf of the Defendant?

MS. HIRZY: Well, there were several other. There was Mr. – what was his name? There was another white gentleman who was paying child support in this case [[8]]. There was also Mr. Tallent who was never married [[9]]. He was a white male sitting over here in the jury box. They were not stricken by the State.

The fact that he is divorced and black I challenge it and object to it, and I think there's a denial of equal protection, due process of law, right to a fair trial, right to an impartial jury, and a right to a cross section of the community. Denial of all.

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[7]See State v. McLaughlin, 988 S.W.2d 542 (Mo.App., E.D. 1999).

[8]Venireman Alexander (Tr. 446-447; Supp.L.F. 5).

[9]In fact, venireman Tallent was married (Supp.L.F. 4).

THE COURT: All your motions and objections are overruled and denied. I find that the State's reasons for striking Mr. Chambers, old No. 40 and new No. 23, are race neutral reasons. Not done for the purpose of [bias] on the part of his race.

Tr. 569-571.

A determination by the trial judge that a peremptory strike was or was not made on racially neutral grounds is a finding of fact that is entitled to "great deference" on appeal. Batson v. Kentucky, supra, 476 U.S. at 98 (n. 21); see also State v. Williams, 24 S.W.3d 101, 120 (Mo.App., W.D. 2000). The trial court may take into account a multitude of factors in making its decision, including such intangibles as demeanor and the court's past acquaintance with the prosecutor, and the race of the defendant and the victim. State v. Parker, 836 S.W.2d 930, 934, 939-940 (Mo. banc 1992), cert. denied 506 U.S. 1014 (1992). The trial judge's decision on this issue will overturned on appeal only if it is shown to be "clearly erroneous"–that is, that the reviewing court is left with the definite and firm impression that a mistake was made. State v. Morrow, 968 S.W.2d 100, 113 (Mo. banc 1998), cert. denied 525 U.S. 896 (1998).

Appellant's failure to challenge at trial two of the three reasons given by the state for striking venireman Chambers–that Chambers equivocated about his ability to impose a sentence of death, and that he had a relative in prison for murder–is fatal to his claim of error on appeal. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct.

1769, 131 L.Ed.2d 874 (1995). Having offered no challenge to two of the prosecutor's grounds for exercising a peremptory strike, appellant did not bear his burden of establishing that the state removed a venireperson "solely on account of [his] race." Batson v. Kentucky, supra, 476 U.S. at 89. Appellant is not at liberty to offer new grounds for a Batson challenge for the first time on appeal. State v. Hubert, 923 S.W.2d 434, 437 (Mo.App., E.D. 1996); State v. Fritz, 913 S.W.2d 941, 946 (Mo.App., W.D. 1996).

Even aside from this, appellant failed to offer any factual basis at trial to support a finding that the state's explanation that it struck venireman Chambers in part because he was divorced was a pretext for racial discrimination. On its face, the marital status of a prospective juror is a legitimate race-neutral classification. State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998), cert. denied 525 U.S. 1161 (1999). Appellant's claim that two white venirepersons were similarly situated is inaccurate: venireman Alexander (the venireperson who was paying child support) was single, not divorced (Supp.L.F. 5); and venireman Tallent was married, not divorced (Supp.L.F. 4). Thus, appellant provided no basis whatever for a finding by the trial court that the state's peremptory challenge was racially discriminatory. Given the absence of any factual support for his allegation of racial discrimination, and the unlikelihood of discrimination against African-American venirepersons in a case where both of the victims were African-American (Tr. 567), the ruling of the court could not have been clearly erroneous.

For the first time on appeal, appellant offers the additional allegation that the trial court failed to evaluate the credibility of the prosecutor's explanations, but instead merely stated that

the reasons given were race-neutral on their face (App.Br. 75-76). This is an unsupportable construction of the trial record. The trial judge specifically asked defense counsel for her response to the state's reasons for striking venireman Chambers (Tr. 571), and after hearing that response found that the peremptory challenge of Chambers was "not done for the purpose of [bias] on the part of [the venireman's] race" (Tr. 571). Not only is there a presumption that trial judges know the law and apply it in making their decisions, State v. McDonald, 10 S.W.3d 561, 564 (Mo.App., S.D. 1999), but the court's own language refutes appellant's implausible thesis that it abrogated its duty to evaluate the truthfulness of the prosecutor's race-neutral explanation.

Having failed to show that the ruling of the lower court was clearly erroneous, appellant's Batson claim should be rejected.

VI.

IN VIEW OF APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO SECTION 494.480.4, RSMO UNTIL THE FILING OF HIS BRIEF ON APPEAL, THIS CLAIM HAS BEEN WAIVED.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN REFUSING TO EXCUSE FOR CAUSE VENIREMAN JOSEPH CLARK BECAUSE (A) APPELLANT'S CLAIM IS FORECLOSED BY §494.480.4 IN THAT CLARK DID NOT SERVE ON APPELLANT'S JURY, HAVING BEEN REMOVED FROM THE PANEL BY PEREMPTORY CHALLENGE, AND APPELLANT WAS NOT ENTITLED TO A "FULL PANEL OF QUALIFIED JURORS" BEFORE EXERCISING HIS PEREMPTORY STRIKES; AND (B) THE TRIAL COURT REASONABLY CONCLUDED FROM CLARK'S TESTIMONY THAT HE COULD SERVE AS A FAIR AND IMPARTIAL JUROR.

Appellant complains that the trial court denied his motion to excuse for cause venireman Joseph Clark on the ground that Clark was a police officer (App.Br. 76-85). He admits, however, that Clark did not serve on his trial jury, having been removed by a peremptory challenge (App.Br. 84; see Supp.L.F. 6).

Appellant acknowledges the existence of §494.480.4, RSMo 2000, which precludes his claim of error:

> [t]he qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a

> motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

For the first time on appeal, appellant contends that this statute violates what he describes as his constitutional right to "a full panel of qualified jurors before expending any peremptory challenges" (App.Br. 84-85). Constitutional claims are waived if they are not presented to the trial court at the first opportunity. State v. Storey, 40 S.W.3d 898, 904-905 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001).

If this Court chooses to overlook appellant's failure to raise this constitutional challenge at the earliest opportunity, it is meritless: criminal defendants do not have a right, under the United States or the Missouri Constitutions, to a "full panel of qualified jurors" from which to exercise their peremptory challenges. In Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the United States Supreme Court recognized that no such right emanated from the Sixth Amendment guarantee of trial by an impartial jury:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error [in failing to excuse a venireman for cause]. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. . . . They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to

achieve that result does not mean the Sixth Amendment was violated. . . . We conclude that no violation of petitioner's right to an impartial jury occurred.

(Citations and footnote omitted.) Id., 487 U.S. at 88.

It was long stated by the courts of Missouri that defendants had a right to a full panel of qualified jurors. E.g., State v. Feltrop, 803 S.W.2d 1, 7 (Mo. banc 1991), cert. denied 501 U.S. 1262 (1991). But this Court has expressly and repeatedly recognized that this right arose from state statute, not from the Missouri Constitution. State v. Richardson, 923 S.W.2d 301, 310 (Mo. banc 1996), cert. denied 519 U.S. 972 (1996); State v. Gray, 887 S.W.2d 369, 383 (Mo. banc 1994), cert. denied 514 U.S. 1042 (1995); State v. Wacaser, 794 S.W.2d 190, 193 (Mo. banc 1990).[10] Indeed, the enactment in 1993 of the above-quoted language in §494.480.4 followed the decision by this Court in State v. Schnick, 819 S.W.2d 330 (Mo. banc 1991) which, in reversing a defendant's conviction for the trial court's failure to excuse for cause a person who ultimately did not serve on the jury, stated as follows:

In reaching the conclusion here, the Court is keenly aware that the jurors

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[10]As cited and discussed in State v. Plummer, 860 S.W.2d 340, 346-348 (Mo.App., E.D. 1993), several appellate decisions in the 1970's (including one by this Court) and a Court of Appeals opinion in 1990 suggested, without citation of authority, that the guarantee of an impartial jury in Article I, §18(a) of the Missouri Constitution (1945) afforded defendants a right to a full panel of qualified jurors before exercising their peremptory strikes. These decisions, while not expressly overruled, have been directly rejected by the decisions of this Court since 1990.

> who actually sat and decided the case were qualified as impartial jurors. The right to have a list of qualified jurors from which to make peremptory strikes arises not from the Constitution; it is the product of §§546.150 and 546.180 [RSMo 1986, repealed 1989] and a long history of interpreting those statutes by the courts. The great web of statutes and precedent has been reenforced by the enactment of almost identical language in §§494.470 and 494.480 in 1989. If this Court were writing on a clean slate, the result might be different. Under these circumstances, if change is to come, it must be from the General Assembly. That body may desire to reconsider whether §547.180.3 and its reenacted version, §494.480.4, should be modified.

Id. at 334. After the enactment in 1993 of the previously-quoted language in §494.480.4, there can be no plausible dispute that litigants do not have a right to a "full panel of qualified jurors" before exercising their peremptory challenges.

Some recent appellate opinions have continued to state, in reliance upon pre-1993 decisional law, that defendants are entitled to a full panel of qualified jurors. E.g., State v. Vincent, 2001 Mo.Lexis 1569 (Mo.App., E.D. September 11, 2001) at *6-*7; Ham v. State, 7 S.W.3d 433, 439 (Mo.App., W.D. 1999). Under the principles and authorities cited above, these statements are incorrect. Appellant's claim that he had a constitutional right to a full panel of qualified jurors is meritless.

In any case, the trial court's refusal to strike venireman Clark for cause could not have been an abuse of that court's discretion. Law enforcement officers are not among those

classes of persons who are categorically ineligible for jury service, §494.425, RSMo 2000, and it has been recognized that "[a] venireperson is not disqualified from serving on a jury merely because he or she is a police officer. . . . Only when other circumstances indicating prejudice exist should the venireman be struck for cause" (citation omitted). State v. Jones, 854 S.W.2d 60, 63 (Mo.App., E.D. 1993). State v. Butts, 159 S.W.2d 790 (Mo. 1942), cited by appellant (App.Br. 81-82), is not to the contrary. See State v. Edwards, 716 S.W.2d 484, 486-487 (Mo.App., E.D. 1986) (rejecting appellant's construction of Butts).

Venireman Clark testified that he worked in a different precinct and had no knowledge of or involvement in the present case (Tr. 124, 480), that he had never worked with the trial prosecutors (Tr. 99-100), that he had "work associations" with some of the police witnesses but was not personal friends with them and could apply the same standards of credibility to them as to any other witness (Tr. 470-472, 480-481, 523-524), and that he could set aside his role as a law enforcement officer and follow the law (Tr. 523-524, 551-552). The trial court extensively considered Clark's qualifications (Tr. 132, 559-561) and ultimately concluded that he could serve as a fair and impartial juror. Appellant's notion that all law enforcement officers must be categorically disqualified as jurors because they have a "working relationship" with prosecutors (App.Br. 79-80) ignores the fact that persons who have a "working relationship" with the criminal defense bar–for example, investigators or staff employed by the public defender's office–suffer no blanket disqualification. Accordingly, appellant's claim that the trial court abused its discretion in refusing to excuse Venireman Clark for cause is meritless, and could not have entitled appellant to a new trial even had Clark served on the jury.

VII.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN DECLINING TO EXCLUDE, SUA SPONTE, EVIDENCE PRESENTED BY THE STATE IN THE PUNISHMENT PHASE OF TRIAL REGARDING APPELLANT'S PREVIOUS CRIMINAL ACTS AND CONVICTIONS BECAUSE THIS EVIDENCE WAS RELEVANT TO THE ISSUE OF APPELLANT'S PUNISHMENT IN THAT IT DEMONSTRATED APPELLANT'S HISTORY OF UNLAWFUL AND DANGEROUS CONDUCT, MUCH OF IT DIRECTED AGAINST HIS THEN-WIFE, TERRI COLE, AND THE FACT THAT HE CONTINUED THIS CONDUCT DESPITE MULTIPLE CRIMINAL CONVICTIONS.

In the punishment phase of trial, the state presented evidence of past misconduct committed by appellant that resulted in several criminal convictions (Tr. 1511-1587):

1. In September of 1994, appellant's automobile was stopped for speeding and officers discovered a loaded and operational pistol concealed under his seat (Tr. 1518-1537, 1574-1577). Appellant pleaded guilty to the felony of unlawful use of a weapon and, after violating his probation, was sentenced to nine months in jail (Tr. 1584-1585).

2. In November of 1994, despite the issuance of an order of protection directing that he refrain from threatening or abusing his then-wife, Terri Cole, appellant unscrewed the lights outside her house and broke her car windshield with his fist (Tr. 1514-1517, 1540-1542, 1552-1553). He pleaded guilty to the

felony of violating an adult abuse order and, after violating his probation, was sentenced to six months in jail (Tr. 1585-1586).

3. On three other occasions in 1994 and 1995, appellant attempted or succeeded in entering Terri Cole's home; on these occasions, he smashed her glass back door, threatened her with a pistol and ripped her telephones out of the wall (Tr. 1539, 1543-1552, 1556-1560). Shortly after one of these intrusions, he was discovered by police near Cole's house carrying two concealed pistols, both loaded and in working condition (Tr. 1560-1568, 1577-1581). Appellant pleaded guilty to the felony of unlawful use of a weapon and was sentenced to nine months in jail (Tr. 1586-1587).

4. In November of 1996, while on work release from the county jail for his second concealed-weapons conviction, appellant failed to return to custody, and later pleaded guilty to the misdemeanor of failing to return to confinement, for which he was sentenced to six additional months in jail (Tr. 1587).

For the first time on appeal, appellant claims that the trial court should not have permitted this evidence to be presented because it portrayed appellant as a person of "bad character" and more deserving of a sentence of death (App.Br. 86).

If this claim is reviewed for plain error, appellant ignores the well-settled fact that a defendant's character, as reflected by past conduct, is a proper subject for the jury's consideration in the punishment phase of a capital case. State v. Christeson, 50 S.W.3d 251, 269 (Mo. banc 2001); State v. Ervin, 979 S.W.2d 149, 158 (Mo. banc 1998), cert. denied 525

U.S. 1169 (1999). This encompasses not only prior convictions, but also unadjudicated criminal conduct, and may also include matters occurring after the offense charged. State v. Christeson, supra. The sentencer "should generally hear any evidence that aids it in making an individualized determination of an appropriate punishment" (citation omitted). State v. Nicklasson, 967 S.W.2d 596, 618 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998); see also Gregg v. Georgia, 428 U.S. 153, 204, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1966) (jury should have "as much information before it as possible when it makes the sentencing decision"). In the present case, it was certainly relevant to the jury's sentencing decision that appellant had demonstrated a history of violating the law, particularly including the repeated harassment and abuse of his then-wife, Terri Cole, and that he was not deterred in that conduct by repeated criminal sanctions.

The fact that appellant's character was relevant to the jury's sentencing decision was not lost on appellant's trial counsel, who called ten punishment-phase witnesses to attest to appellant's good character (Tr. 1596-1628). Appellant identifies no principle of law or justice that would mandate that the jury be misled by the exclusion of contrary evidence.[11] The trial

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[11]Appellant's description of the evidence described above as "victim impact evidence" (App.Br. 91-92) is simply inaccurate. Victim impact evidence concerns "personal characteristics of the victim and the emotional impact of the crimes on the victim's family." Payne v. Tennessee, 501 U.S. 808, 817, 111 S.Ct 2597, 115 L.Ed.2d 720 (1991). The evidence at issue had nothing to do with the character of Anthony Curtis or the impact of his death, but instead demonstrated appellant's history of criminal and abusive behavior long

court had broad discretion in the admission of punishment-phase evidence, State v. Storey, 40 S.W.3d 898, 903 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001), and it could not have abused that discretion or committed manifest injustice in admitting evidence of appellant's prior criminal misconduct.

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before his murder of Curtis and his attempted murder of Terri Cole.

VIII.

IN VIEW OF THE FACT THAT APPELLANT DID NOT ATTEMPT TO ASK THE DEFENSE WITNESSES IN THE PUNISHMENT PHASE WHETHER THEY WOULD VISIT APPELLANT IN PRISON, BUT INSTEAD CHOSE TO ASK A DIFFERENT QUESTION AFTER A MOTION IN LIMINE WAS SUSTAINED AS TO THE ABOVE INQUIRY, APPELLANT CANNOT LEGITIMATELY CLAIM THAT THE TRIAL COURT ERRED IN "REFUSING TO ALLOW" THIS INQUIRY.

IN ANY EVENT, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT MANIFEST INJUSTICE IN SUSTAINING THE STATE'S MOTION IN LIMINE BECAUSE WHETHER APPELLANT'S FRIENDS AND RELATIVES WOULD VISIT HIM IN PRISON WAS IRRELEVANT TO THE ISSUE OF PUNISHMENT IN THAT IT HAD NO BEARING ON APPELLANT'S CHARACTER OR HIS MORAL CULPABILITY FOR HIS CRIMES.

The defense called ten witnesses in the punishment phase, including appellant's mother and sister, his pastor and a number of appellant's friends (Tr. 1596-1628). These witnesses testified, variously, that appellant was kind and caring (Tr. 1596-1597, 1607, 1610, 1613-1614), helpful and dependable (Tr. 1596-1597, 1603, 1613, 1627), a hard worker (Tr. 1616, 1618-1620) and a good churchgoer (Tr. 1597, 1611, 1624).

Before the beginning of the punishment phase, the state filed a motion in limine that sought to preclude certain lines of inquiry by the defense in examining the punishment-phase witnesses, including testimony that appellant's relatives would visit him in prison (L.F. 173-

174). The trial court sustained this motion in limine (Tr. 1498-1500). In questioning the defense witnesses, appellant's counsel did not attempt to ask any of them if they would visit appellant in prison; instead, counsel inquired of each witness whether losing contact with appellant would have an "impact" on their lives (Tr. 1598, 1601, 1604, 1608, 1611, 1614, 1616, 1620-1621, 1625, 1627).[12] Each witness testified that appellant's absence would have an adverse effect upon them (Tr. 1598-1599, 1601-1602, 1604, 1608-1609, 1611, 1614, 1616, 1621, 1625, 1627). Despite the fact that appellant's counsel made no effort to ask the punishment-phase witnesses if they would visit appellant in prison, appellant now claims that the trial court's "refus[al] to allow" this question was reversible error (App.Br. 94-96).

The fact that appellant abandoned this line of inquiry is dispositive of his claim:

> A ruling in limine is interlocutory only and is subject to change during the course of the trial. . . . Accordingly, the proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof.

(Citations omitted.) State v. Purlee, 839 S.W.2d 584, 592 (Mo. banc 1992). Appellant did neither of these things, and instead chose to alter his inquiry in a manner that put it beyond the scope of the motion in limine granted by the court. By complaining that the trial court "refus[ed] to allow" defense counsel to ask the original question, appellant "is in effect asking [this Court] to convict the trial court of an error it did not commit." State v. McCullum, 2001

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[12]A state objection that this question was the same as asking the witnesses if they would visit appellant in prison was overruled by the court (Tr. 1620-1621).

Mo.App.Lexis 1986 (Mo.App., S.D. October 31, 2001) at *44.

Even had defense counsel actually sought to ask the defense witnesses whether they would visit appellant in prison, the trial court had broad discretion in the admission of punishment-phase evidence, State v. Storey, 40 S.W.3d 898, 903 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001), and it would not have abused its discretion in precluding such an inquiry. While the United States Supreme Court has held that the sentencer in a capital case "[cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record," Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), it was simultaneously stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id., 438 U.S. at 604 (n. 12); see also State v. Schneider, 736 S.W.2d 392, 396 (Mo. banc 1987), cert. denied 484 U.S. 1047 (1988). Testimony by appellant's friends and relatives that they intended to visit him in prison would have been to their own credit, but it would have offered nothing whatsoever relating to appellant's character or degree of moral culpability. This Court reached that conclusion in State v. Nicklasson, 967 S.W.2d 596 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998), in which it held that an identical inquiry was properly excluded because it "is not relevant to the punishment question." Id. at 619.

Appellant asserts, for the first time on appeal, that whether his friends and relatives in prison would visit him was relevant to show that he "would make a good adjustment to prison and, therefore, that life imprisonment without parole was an appropriate sentence" (App.Br.

96). Once again, this inquiry would have shown the state of mind of the witnesses, but would have had no relevance at all to appellant's mental state, including whether or not he would make a "good adjustment" to incarceration. Even had this question been asked, the trial court would not have abused its discretion had it sustained an objection to it. State v. Nicklasson, supra.

IX.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE SUBMISSION IN THE PUNISHMENT PHASE OF THE "LIFE OPTION" INSTRUCTION, MAI-CR 3D 313.46A, BECAUSE THIS INSTRUCTION DID NOT MISINFORM THE JURY ON THE LAW IN THAT, WHEN READ WITH THE PUNISHMENT-PHASE INSTRUCTIONS AS A WHOLE, IT DID NOT INSTRUCT THE JURY THAT IT COULD DISREGARD MITIGATING EVIDENCE.

Appellant attacks MAI-CR 3d 313.46A, the "life option" instruction that informs the jury in the punishment phase that it is never required to impose a sentence of death (App.Br. 98-102). As given at appellant's trial, this instruction read as follows:

> As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. **You must consider all the evidence in deciding whether to assess and declare the punishment at death.** Whether that is to be your final decision rests with you.

Emphasis supplied; L.F. 183. Appellant complains of the emphasized language, asserting that this instruction "is deficient in that it omits critical language telling the jury that they must consider all the circumstances in determining whether to impose a sentence of life imprisonment" (App.Br. 99). As he concedes (App.Br. 98), this argument was recently rejected by this Court in State v. Storey, 40 S.W.3d 898, 912 (Mo. banc 2001), cert. denied

122 S.Ct. 272 (2001).

Appellant's argument suffers from two defects, the first of which is semantical. Since there are only two possible punishments for first degree murder–death or life imprisonment without parole–instructing the jury that it must consider all of the evidence in deciding whether to impose a death sentence also necessarily told them to consider all of the evidence in determining whether or not to sentence appellant to life imprisonment. Appellant's notion that the instruction quoted above "left the jury free to ignore mitigating evidence" (App.Br. 98) is a facially-untenable distortion of the instructional language.

Second, as this Court noted in Storey, appellant's argument overlooks other punishment-phase instructions given to the jury and the role of the "life option" instruction in the capital sentencing scheme. The instruction that immediately preceded the "life option" instruction reads as follows:

> If you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment phases of trial.
>
> As a circumstance that may be in mitigation of punishment, you shall consider:

Whether the defendant has no significant history of prior criminal activity.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. 182. This instruction expressly required the jurors to consider any and all mitigating factors that they found from the evidence and, if the evidence in mitigation outweighed the evidence in aggravation, to sentence appellant to life imprisonment. Thus, if the jury reached the final, "life option" stage of capital sentencing,[13] it had already concluded that the evidence in aggravation of punishment outweighed the evidence in mitigation. That is why MAI-CR 3d 313.46A informs the jury that "[y]ou must consider all the evidence in deciding whether to assess and declare the punishment at death": because, at the "life option" stage, the jury has sought and failed to find any reason to impose a sentence other than death. Viewing the punishment-phase instructions as a whole, State v. Storey, supra, the jury was required to

[13]For a summary of the four-step process prescribed by Missouri law for capital sentencing, see the argument under respondent's Point X, infra.

consider all of the evidence in mitigation of punishment in determining whether to sentence appellant to death or life imprisonment.

As part of his attack on the "life option" instruction, appellant complains that "none of the other instructions given to the jury told them that they 'must' consider the mitigating cirumstances" (App.Br. 100). If appellant's argument is that the punishment-phase instructions authorize a juror to decide that a particular fact is mitigating and then to ignore it, his claim is factually inaccurate: the mitigating-evidence instruction quoted above states that the jurors "shall" consider any mitigating facts or circumstances that they find from the evidence, including the statutory mitigating circumstance listed in the instruction (L.F. 182). If, on the other hand, appellant's position is (as it appears to be) that he may dictate to the jury what mitigating factors exist by inserting them into an instruction–for example, that a defendant with four prior convictions, including three felonies, has "no significant history of prior criminal activity"–then he is mistaken as a matter of law. It is for the jury, not for appellant, to determine the existence of mitigating circumstances. State v. Debler, 856 S.W.2d 641, 655 (Mo. banc 1993).

Appellant's attack upon MAI-CR 3d 313.46A is meritless.

X.

THE CIRCUIT COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE SUBMISSION IN THE PUNISHMENT PHASE OF THE VERDICT MECHANICS INSTRUCTION, MAI-CR 3D 313.48A, BECAUSE THIS INSTRUCTION DID NOT MISLEAD THE JURY INTO BELIEVING THAT IT WAS NOT REQUIRED TO FIND THAT THE EVIDENCE IN AGGRAVATION OF PUNISHMENT OUTWEIGHED THE EVIDENCE IN MITIGATION OF PUNISHMENT BEFORE RETURNING A SENTENCE OF DEATH IN THAT (A) THIS INSTRUCTION DID NOT PURPORT TO LIST ALL OF THE STEPS IN THE CAPITAL SENTENCING PROCESS, AND (B) THE JURY WAS SEPARATELY INSTRUCTED THAT IT WAS REQUIRED TO FIND THAT THE AGGRAVATING EVIDENCE OUTWEIGHED THE MITIGATING EVIDENCE BEFORE IT COULD ASSESS A DEATH SENTENCE.

Finally, appellant attacks the verdict mechanics instruction, MAI-CR 3d 313.48A, that was submitted in the punishment phase of trial (App.Br. 102-108). As he acknowledges (App.Br. 104), this claim was also rejected by this Court in State v. Storey, 40 S.W.3d 898, 912 (Mo. banc 2001), cert. denied 122 S.Ct. 272 (2001).

A. Statutory and Instructional Background

Under the law of Missouri, capital sentencing is a four-step process. Section 565.030.4, RSMo 2000. Each of these four steps is conveyed to the sentencing jury by a separate MAI-CR instruction form:

Decisional Step	MAI-CR 3d

1. Finding at least one statutory aggravating circumstance–§565.030.4(1) 313.40

2. Finding that aggravating evidence warrants a sentence of death–§565.030.4(2) 313.41A

3. Finding that aggravating evidence outweighs mitigating evidence–§565.030.4(3) 313.44A

4. Deciding not to impose a death sentence ("life option")–§565.030.4(4) 313.46A

An instruction describing each of these four steps was submitted to the jury at appellant's trial (L.F. 179-183).

The verdict mechanics instruction is given after these instructions and explains to the jury how to fill out the punishment-phase verdict forms. As submitted at appellant's trial, MAI-CR 3d 313.48A read as follows:

> You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.
>
> As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Anthony Curtis, your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction

No. 18 which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Anthony Curtis by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt as submitted in Instruction No. 18, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment which warrant the imposition of a sentence of death, as submitted in Instruction No. 19, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find that matters described in Instructions No. 18 and 19, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

Emphasis supplied; L.F. 184-185.

The fourth paragraph of this instruction (the first paragraph in bold) advises the jury that, if it is unable to agree on either of the first two steps in the four-step process, it is required to return a verdict of life imprisonment. The fifth paragraph (the second bold paragraph) tells the jury that if it is unable to agree upon punishment after the first two steps, it must return a verdict stating that it is unable to agree upon the punishment.[14] Since it does not matter which step the trier is unable to agree upon after the first two steps, the instructions submitting the third and fourth steps are not specifically cross-referenced in this instruction.

Appellant's entire argument is that, because no specific reference was made in the verdict mechanics instruction to the instruction that advises the jury of the third step, that the

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[14]This distinction exists because of the specific language of §565.030.4: it states that the trier must return a verdict of life imprisonment if it does not find one of the first two steps. An inability of the jurors to agree on either of the first two steps, therefore, mandates a sentence of life imprisonment. By contrast, the jury is required to return a sentence of life imprisonment only if it "concludes" or "decides" that the third or fourth steps are not present, which authorizes the court to assess punishment if the jury is unable to agree at this stage.

aggravating evidence must outweigh the mitigating evidence (L.F. 182), the jury was misled in believing that this was not a prerequisite to the imposition of a death sentence (App.Br. 105-106).

B. Appellant's Claim is Meritless

Appellant's argument suffers from two fatal defects. First, the premise underlying appellant's argument, that the instruction in question "takes the jury, step by step, through the deliberation process" (App.Br. 105), is faulty. This instruction not a verdict director–it is a verdict mechanics instruction. That is, it did not purport to summarize the elements of proof required for the trier to reach a decision on punishment, but instead told the trier how to fill out the verdict forms based upon certain eventualities that might arise during their deliberations. Nothing in this instruction stated or suggested that it contained a comprehensive list of the requirements for returning a sentence of death.[15] Therefore, no need existed to list all of the steps in the capital sentencing process in this instruction.

Second, as this Court noted in Storey, appellant's theory that this instruction could have misled the jurors ignores the well-settled principle that an instruction is not to be considered in isolation, but rather is to be read together with all of the instructions as a whole. Id., 40 S.W.3d at 912; see also Boyde v. California, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Examining the instructions as a whole–including Instruction No. 20, which expressly informed the jurors that they were required to find that the evidence in aggravation outweighed the evidence in mitigation before returning a sentence of death (L.F. 182)–it is

[15]Nor did the prosecutor say that it did (Tr. 1644).

frivolous for appellant to contend that the jury could have labored under the misapprehension that this was not a prerequisite for a capital sentence.

For these reasons, appellant's attack upon MAI-CR 3d 313.48A is meritless.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of December, 2001, to:

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